

Editorial and advertising content on on-demand services is already highly regulated with regard to child viewer protection. In its current draft the 'Age-appropriate design: code of practice' risks introducing a disproportionate and confusing additional layer of regulation and sanctions that would negatively impact the quality and competitiveness of the on-demand sector.

Dear Information Commissioner

We are writing to you on behalf of the television on-demand industry forum (TODIF) in response to the Information Commissioner's Office's consultation document *Age appropriate design: a code of practice for online services* ("the Consultation").

TODIF

TODIF is an industry-led forum whose membership is made up of all the on-demand programme services ("ODPS") currently notified to Ofcom, the sector's statutory regulator. TODIF meetings enable members to share information and discuss policy developments, with relevant regulatory stakeholders such as the DCMS, the IPO, and of course our lead regulator, Ofcom. Our members include on-demand only services, such as Vevo, Curzon, and Filmdoo, channel distribution platforms such as Virgin Media, Sky and BT, and catch-up services provided by linear television broadcasters, like Discovery, ITV, Channel 4 and NBCU¹. The services provided by our members can be accessed via a broad range of platforms and devices including websites and set top boxes, as well as apps on smart phones and tablets. On-demand, the fastest growing part of the "TV" sector, is funded variously by advertising revenue, subscriptions, and in some cases the BBC licence fee.

Scope

It is clear from pages 11 and 12 of the Consultation, in the section entitled '*Services covered by this code*', that the ICO intends to consider most of the services provided by our members as being in scope of the proposed *Age-appropriate design code* ("the Code"). Especially when it clarifies the definition of an *information society services* ("ISS") as follows:

"Essentially this means that most online services are ISS, including apps, programs and many websites including search engines, social media platforms, online messaging services, online marketplaces, content streaming services (e.g. video, music or gaming services), online games, news or educational websites, and any websites offering other goods or services to users over the internet. Electronic services for controlling connected toys and other connected devices are also ISS."

Our members take audience protection, and in particular that of child viewers, very seriously and welcome this initiative to further safeguard against the misuse of children's personal data on-line. As a

¹ A full list of TODIF members can be found at:

https://www.ofcom.org.uk/_data/assets/pdf_file/0021/67710/list_of_regulated_video_on_demand_services.pdf

group, and as individual members, we will continue to work closely with the relevant regulatory bodies, to ensure our viewers, and in particular child viewers, benefit from the highest standards of information and protection.

With this in mind, and in response to the Consultation, we would like to outline the existing regulatory and co-regulatory content standards and viewer protection safeguards our members already adhere to. We would also like to raise the important concern that, in its current form, the Code places a disproportionate, and possibly unintended, additional burden on ODPS providers, who are already very thoroughly regulated by existing bodies and their codes.

Current Regulation

All UK-established ODPS are obliged by law to notify themselves to Ofcom and abide by Ofcom's *On-demand programme service rules*, which include rules on sponsorship, hate speech and protecting under-18s. All adverts that appear on an ODPS are subject to the Committee on Advertising Practice Code ("the CAP Code")² which has specific sections on ads directed at children, the use of data for marketing, and guidance on the restriction of certain ads around online spaces that attract children.

In addition, sites take additional measures of their own, including PIN protection and on-screen and audio content warnings where appropriate. ODPS providers that also have linear broadcast channels will apply exactly the same compliance standards' restrictions to their on-demand content as they do to their broadcast content, and movie-based ODPS will use age-based ratings similar to those used in the cinema.

The Code

Our primary concern with the Code, as currently drafted, is that it seeks to establish a presumption that an ISS, in our case an ODPS provider, will put in place the highest level of privacy settings, with no profiling of users, as the default setting, unless the ODPS can show evidence that children are not likely to access the service in practice by using "market research, the nature and context of the service, or specific measures you have taken to limit access by children." The proposal continues:

"The important point is that even if the service is aimed at adults, you must be able to point to specific documented evidence, to demonstrate that children are not likely to access the service in practice."

Our members report that it is still not possible to obtain the same high degree of specificity of viewer data for on-demand usage as it is for broadcast, which uses the BARB data upon which the BCAP advertising child protection regime is based. Consequently, our members would like more guidance and discussion on exactly what form the "specific documented evidence" might take.

Further, this leaves ODPS with the invidious choice of either installing "robust age verification" procedures, which we would argue are disproportionately cumbersome for a service not aimed at or attractive to children or 'water down' the content on offer in order to avoid being seen as targeting inappropriate content and adverts to viewers of an unknown age-profile.

² https://www.asa.org.uk/type/non_broadcast/code_section/appendix-2.html

Viewers can be reluctant to complete extensive web registration forms, so ODPS providers face suffering an adverse revenue impact by not being able to optimise the content and the adverts they would like to offer to adult viewers.

Members have also noted that a default need to make age-verification procedures and navigation prompts “age-appropriate” for each of the five age-based developmental stages identified by the ICO, is an extraordinary additional technical and design development burden for ODPS providers. This is because, in reality, ODPS providers may not have, or seek, child viewers, but due to the current vagaries of on-line audience data, providers may not be able to prove this to the ICO’s satisfaction.

Conclusion

In short, TODIF members are concerned that the proposed Code introduces an unreasonable additional and unnecessary burden of regulation to a sector that is already highly regulated by two other key bodies: Ofcom and CAP.

Members who do not seek or attract child viewers are especially concerned that they are faced with a choice between introducing expensive age verification and navigation measures (making their services less attractive to existing users to guard against child viewers who do not use their services), or refrain from *any* sort of content or marketing optimisation.

This quandary is especially onerous in view of the direct relationship between the proposed Code and the ICO’s GDPR enforcement powers.

We urge the ICO to reconsider its recommendations on the scope of this Code. In particular the ICO should:

- (a) provide greater clarity on the evidence requirements for “not likely to attract children”, and the circumstances in which default provisions of protection are required to commence; and
- (b) acknowledge that services that already fulfil their regulatory obligations to CAP and Ofcom in relation to child protection should benefit from a starting presumption that this Code does not apply to them.

Finally, we would also ask that the ICO carefully coordinates any additional regulatory framework, such as the proposed Code, with other potentially overlapping legislation currently being worked through by Government such as the Online Harms White Paper and the DCMS consultation on the implementation of the EU Audiovisual Media Services Directive.

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